92-1461

Supreme Court, U.S.
FILED
MAR 8 1993
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PETROLITE CORPORATION,
Petitioner,

VS.

RICHARD L. GODAR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the standard for liquidated (double) damages liability announced by this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), a disparate impact case, should be applied to claims of individual discriminatory treatment under the Age Discrimination in Employment Act?

2. Whether or not a finding of willfulness under the ADEA may be based solely upon inferences, rather than direct evidence of willful age discrimination by the decisionmaker?

3. Whether an individual allegedly discharged in a discriminatory manner who chooses to open and operate his own business rather than engage in comparable employment, and who chooses not to pay himself for his admitted services during the period of time in which he has a duty to mitigate his losses, should have his damage award (1) reduced by an amount attributable to his self-imposed incurrence of loss of salary, and (2) should also have the award reduced by the increase in capital assets of his business, in order to avoid a windfall to the Plaintiff?

LIST OF PARTIES

The parties to the proceedings below were Petitioner Petrolite Corporation[1] and Respondent Richard L. Godar.

[1] The Petitioner, Petrolite Corporation, has no parent or non-wholly owned subsidiary companies. Petrolite has an ownership interest in the following foreign companies: Italiana S.p.a., Petrolite (Malaysia) S.dn. Bhd., Petrolite Suramericana S.A., and Toyo-Petrolite Company, Ltd.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Petrolite Corporation respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not reported; the Court of Appeals' opinion is reprinted in Appendix A hereto. The Memoranda and Orders of the District Court (J. Limbaugh) are not reported, and are reprinted in Appendix B and Appendix C hereto.

JURISDICTION

The Respondent brought this action in the United States District Court for the Eastern District of Missouri, invoking

federal jurisdiction pursuant to 29 U.S.C. § 626(c) and 28 U.S.C. § 1337. After a three day trial, the jury found the Defendant liable for age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*. The jury further found Defendant's violation of the statute to have been "willful", thereby authorizing the assessment of liquidated (double) damages in accordance with the provisions of Section 7(b) of the ADEA, 29 U.S.C. § 626(b).

Judgment was entered on behalf of the Plaintiff on July 1, 1988. Petrolite timely filed a motion for judgment notwithstanding the verdict and motion for new trial. Plaintiff filed motions for costs and equitable relief, including attorney's fees. The trial court, having considered Petrolite's and Plaintiff's motions issued its order of September 8, 1988 awarded Plaintiff costs and attorney's fees and denied Petrolite's motions for judgment notwithstanding the verdict and for a new trial. Thereafter, Petrolite filed its timely notice of appeal to the Eighth Circuit Court of Appeals.

The Court of Appeals dismissed the appeal without prejudice by order dated June 29, 1989, based upon a finding that additional claims for equitable relief remained to be decided by the trial court. Thereafter, by Order dated October 10, 1989, the trial court ordered reinstatement of the Plaintiff, and by Order dated May 31, 1991, the trial court ordered additional frontpay be awarded the Plaintiff for the period from the date of trial until reinstatement, which reinstatement occurred November 30, 1989. Thereafter, Petrolite filed its timely notice of appeal in the Court of Appeals on June 28, 1991.

On October 29, 1992 a three judge panel of the Eighth Circuit Court of Appeals affirmed the judgment of the District Court. Petitioner sought reconsideration through a timely Petition for Rehearing with Suggestions for Rehearing En Banc; on December 8, 1992 the Court of Appeals denied the Petition for Rehearing as well as the Suggestion for Rehearing En Banc. (Appendix D).

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, provides in material part as follows:

> "**§623. Prohibition of age discrimination**
>
> (a) Employer Practices. It shall be unlawful for an employer—
>
> 1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]
>
> **§626. Recordkeeping, investigation, and enforcement**
>
> (b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and overtime compensation; liquidated damages; judicial relief; conciliation, conference and persuasion[.]
>
> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section... Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter."

STATEMENT OF THE CASE

This case arises out of the termination of Plaintiff Richard L. Godar's employment with Petrolite Corporation ("Petrolite" or

the "Company") as part of a reduction in force in August, 1985. Plaintiff was laid off from his position as a chemist at the Company's facility in St. Louis, Missouri as a result of his identification by the Company as one of the poor performers who would be let go during an economic downturn in Defendant's business. As the parties acknowledged by joint stipulation before trial, in addition to the Plaintiff, approximately 20 other employees were let go by the Company at the same time as part of the reduction in force. The Plaintiff was 55 years old at the time of his termination.

At trial, Plaintiff argued that the Company's articulated reasons for selecting the Plaintiff as part of the reduction in force were pretextual, and that the true motivation was to replace Plaintiff with a younger employee. The jury returned a verdict in favor of the Plaintiff, and awarded him $193,000 in compensatory damages under the ADEA. The jury also found the Company's purported violation of the statute to be "willful".[2] The District Court assessed an additional $193,000 in liquidated damages against the Company pursuant to § 7(b) of the ADEA, 29 U.S.C. § 626(b).

On Defendant's Post-Trial Motion for Judgment Notwithstanding the Verdict, the District Court upheld the jury's findings of age discrimination and willfulness. On appeal, the Eighth Circuit affirmed the judgment with respect to both ADEA liability and willfulness. Relying principally upon what it found to be supportable inferences that the real reason for the selection of Plaintiff for the reduction in force was age discrimination, the Court of Appeals held that a claim of unlawful age discrimination had been made out. In the Court of Appeals' discussion

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[2] The jury was instructed in this regard based upon the standard for willfulness announced in *Trans World Airlines, Inc. v. Thurston*, i.e., whether the employer knew, or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.

regarding liquidated damages, the Court further concluded that the jury was open to find willfulness under the statute, once again based upon the jury drawing inferences from the evidence presented. No direct evidence of willfulness was presented at trial. Rather, the Eighth Circuit adopted wholesale, as its own, that argument which was made in Plaintiff's appellate brief. As stated by the Eighth Circuit in support of its finding that willfulness was demonstrated:

> "*Appellee in his brief argues the following scenario*:
>
> A clear pattern is presented by the evidence. Petrolite begins generating problems for Mr. Godar in late 1984. A replacement is contemplated. Petrolite wants the replacement hired and trained before Mr. Godar is discharged. When Mr. Godar selects a older individual, his decision is promptly vetoed. Another individual is hired, age 26.[3] After Mr. Godar has trained and acclimated his replacement, he is demoted. When he asks for reconsideration, Petrolite suggests he take early retirement. When he declines, he is discharged.
>
> Appellee's brief, pp. 25-26.
>
> *The evidence in this case would permit a reasonable jury to draw such inferences*. (slip opinion p. A-9, 10) (emphasis added)."

Significantly, the Court does not cite any direct evidence adduced at trial in support of liquidated damages, but merely quotes a scenario postulated in Plaintiff's brief.

By expressly permitting the finding of willfulness in the present case to be sustained based upon mere inferences, rather

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[3] This recitation failed to identify the fact that it was Mr. Godar himself who had recruited and recommended the Company hire the 26 year of age chemist.

than direct evidence above and beyond that required for a finding of age discrimination, the Eighth Circuit's decision conflicts with Eighth Circuit precedent demonstrating the type of evidence necessary to support such a finding. Specifically, in sustaining the jury's award of liquidated damages, the Eighth Circuit decision was in conflict with prior Eighth Circuit precedent requiring *direct* evidence of willful age discrimination in order to support liquidated damages, rather than mere inferences. Notwithstanding its acknowledgement in prior cases that a finding of willfulness requires direct evidence, above and beyond the quantum of evidence required for an underlying finding of ADEA liability, the Eighth Circuit has apparently adopted a contrary test in the present case which authorizes liquidated damages in virtually every case where disparate treatment is found under the ADEA. In so ruling, the Court of Appeals has at once disregarded the legislative history of the ADEA, misconstrued this Court's interpretation of the ADEA in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), discarded Eighth Circuit precedent, and placed the Eighth Circuit in conflict with the strong consensus of Federal Courts holding that the two tier liability scheme envisioned by Congress in enacting the ADEA requires proof beyond that necessary to establish predicate age discrimination to warrant a finding of willfulness.

Also of relevance to this matter, based upon the evidence adduced at trial, Plaintiff failed to mitigate his damages following his termination by Defendant. As the undisputed evidence at hearing demonstrated, following Plaintiff's layoff in August, 1985, Petrolite provided Plaintiff and other employees the use of an outplacement service that Plaintiff elected not to use. Moreover, Plaintiff admitted that for over a two year period of time after his termination, he submitted no applications for employment with any employer, nor did he visit any places of employment seeking work. Rather, in December, 1985, approximately three months after his termination of employment with the

Company, Plaintiff opened his own business, where Plaintiff testified that he worked 40 hours per week. Although the Plaintiff's business enjoyed an increase in assets, Plaintiff chose not to pay himself any salary for his over 40 hours of work per week at any time. In effect, Plaintiff was permitted to artificially lower a proper deduction required to be made from his monetary award by failing to pay himself any salary whatsoever for his labors, instead choosing to retain said increases in capital in his business.

Without discussion of this issue, the Eighth Circuit confirmed the decision of the trial court in this matter. While the Eighth Circuit has never ruled directly on this issue, the trial court cited a well-reasoned Third Circuit case[4] which sets out the proper deductions to be considered in valuing self-employment in the context of mitigation of damages. However, despite enumerating these proper deductions, the trial court nevertheless failed to take into account the increase in assets experienced by Plaintiff's business during the relevant period, or the fact that Plaintiff failed to pay himself any salary during the relevant period.

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[4] *Carden v. Westinghouse*, 850 F.2d 996, (3rd Circuit 1988).

REASONS FOR GRANTING THE WRIT

This Petition for a Writ of Certiorari calls the Court's attention to important issues of Federal law about which the Courts of Appeal are deeply divided. The first issue concerns the quantum of evidence required for a finding of willfulness under the Age Discrimination in Employment Act, and whether the willfulness standard developed by the Supreme Court in *Trans World Airlines, Inc. v. Thurston*, developed in the context of a disparate impact case, must be modified for claims of individual discriminatory treatment, in light of its consequence of imposing automatic punitive damages in such cases. As a corollary to this issue, this matter also raises the question of whether an alleged victim of disparate treatment must present direct evidence of willfulness in order to support an award of liquidated (double) damages under the ADEA.

This Petition also raises the question of the proper valuation of self employment when a discrimination plaintiff operates his own business in an attempt to mitigate his damages and when the Plaintiff admits it was his own interests in coins that caused him to lower his sights rather than diligently seek work in a comparable field of employment as that previously held. In failing to make proper deductions from Plaintiff's award of monetary damages in this matter, the Courts below have effectively permitted Plaintiff to artificially increase his monetary award, while at the same time benefitting from the increase in assets of his business, resulting in a windfall for Plaintiff. Defendant submits that this situation raises an important question of federal law which has not been, but should be, settled by this Court.

I. The Court of Appeals' Application of the Liquidated Damages Provision of the Age Discrimination in Employment Act Raises Important Questions of Federal Law That Should be Decided by This Court.

A. The Eighth Circuit's Decision Sustaining the Finding of Willfulness Under the ADEA is Contrary to the Congressional Intent of Liquidated Damages and Conflicts With Other Circuit Courts That Have Addressed This Issue.

The Court of Appeals' decision sustaining liquidated damages against the defendants pursuant to Section 7(b) of the ADEA, 29 U.S.C. § 626(b), ignores Congress's intent in enacting this punitive provision of the statute, and destines employers to incur liquidated (double) damages liability in literally every disparate treatment case in which a jury finds a predicate violation of the ADEA. The willfulness requirement for liquidated damages embodied in Section 7(b) of the ADEA is not defined by the statute. In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), however, this Court articulated a standard for "willful" violations that would justify the assessment of double damages thereunder. After reviewing the structure and legislative history of the statute, and finding therein that Congress enacted Section 7(b) to create a second tier of ADEA liability that would be punitive in nature and thus reserved for more flagrant violations of the law, the Supreme Court held that a "willful" violation is made out only upon a showing that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Thurston*, 469 U.S. at 128-29.

Since *Thurston*, which, like the typical disparate impact case, involved a company-wide plan or policy that adversely affected

an older segment of the employer's work force, federal courts have struggled to apply the "knew or showed reckless disregard" standard for willfulness liability to the claims of individual discriminatory treatment which dominate ADEA litigation.[5] The difficulty arises because, in individual discriminatory treatment cases, a finding of predicate discrimination liability necessarily requires a finding of discriminatory intent. Accordingly, a mechanical application of *Thurston* to discriminatory treatment (in distinction to disparate impact) claims will inexorably lead to double damages in every case, a result contrary to the clear Congressional intent explicated by the Supreme Court in *Thurston*. *See Wheeler v. McKinley Enterprises*, 937 F.2d 1158, 1163 (6th Cir. 1991) ("The courts have had some difficulty in finding a definition of "willfulness" that allows for the award of double damages where appropriate, but does not result in double damages being awarded as a matter of course whenever an employee is discharged or otherwise discriminated against because of his age. It is clear that Congress did not intend that double damages be awarded automatically whenever a violation of the ADEA occurs."); *Lindsey v. American Case Iron Pipe Co.*, 810 F.2d 1094, 1100 (11th Cir. 1987) ("We find the knowing or reckless disregard standard difficult to reconcile with the admonition to avoid imposing liquidated damages in every case, at least in the context of disparate treatment cases.").

Recognizing this problem, numerous federal circuits have, when applying *Thurston* to discriminatory treatment cases such

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[5] This Court recently heard oral argument in the case of *Hazen Paper Company v. Biggins*, 953 F.2d 1405 (1st Cir. 1992), *cert. granted* (June 22, 1992, No. 91-1600). In *Hazen Paper*, this Court will consider, *inter alia*, whether the *Thurston* standard should be modified for claims of individual discriminatory treatment, hopefully resolving the conflict within the Circuits on this issue. This case, in contrast to *Hazen*, presents additional issues that may not be fully resolved in *Hazen Paper* since the termination here was during a reduction in force caused by business losses.

as the present one, required a greater evidentiary showing to surmount the willfulness threshold than that sufficient to permit an ordinary inference of age discrimination. Thus, the Third Circuit requires ADEA plaintiffs to establish "some additional evidence of outrageous conduct" to warrant the imposition of liquidated damages. *See Dreyer v. ARCO Chemical Co.*, 801 F.2d 651, 658 (3d Cir. 1986) *cert. denied*, 480 U.S. 906 (1987). Similarly, the Fifth Circuit requires evidence of "egregious" actions beyond ordinary age discrimination to permit the assessment of liquidated damages. *See Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989).

In contrast to the "outrageous" and "egregious" tests for distinguishing ordinary violations of the ADEA from "willful" ones, the Sixth and Tenth Circuits have held that a plaintiff may recover liquidated damages only if he proves that age was the "predominant factor" in the employer's discharge decision. *See Schrand v. Pacific Elec. Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988).

Finally, the Fourth, Seventh and Eighth Circuits—while eschewing precise verbal formulations or tests—have all held that a plaintiff must introduce a greater quantum of evidence than that sufficient to permit underlying ADEA liability if he is to meet the higher standard of proof required for willfulness. *See August v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1224 (7th Cir. 1991) (to prove willfulness, a plaintiff "must provide evidence beyond that which would prove an ordinary claim of age discrimination"); *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989) (construing "willfulness" to require "direct evidence—more than just an inference from, say, an arguably pretextual justification—of age-based animus"); *Gilliam v. Armtex, Inc.*, 820 F.2d 1387, 1390-91 (4th Cir. 1987) (stating that evidence of age discrimination that is "too thin" will not

sustain liquidated damages).[6] *See also EEOC v. District of Columbia, Dep't of Human Services*, 729 F.Supp. 907, 917 (D.D.C. 1990), vacated without op., 925 F.2d 488 (D.C. Cir. 1991) ("some evidence in excess of that necessary to establish a violation [of the ADEA] is needed to support a finding of willfulness").

Although courts cited above are clearly in conflict over the particular legal standard to apply to individual claims of "willful" discrimination under the ADEA, each attempts to fulfill the statute's legislative intent—as recognized by this Court in *Thurston*—of having a two-tier scheme of liability that will not result in the assessment of liquidated damages in every case. By contrast, the decision of the Eighth Circuit in the present case to apply the "knew or showed reckless disregard" standard of *Thurston* without modification or limitation to individual discriminatory treatment cases, effectively dismantles the second tier of punitive liability envisioned by the statute. By so doing the Eighth Circuit has virtually guaranteed the imposition of liquidated damages in every future case where discriminatory treatment on the basis of age is found.

Given the varying approaches of the federal courts since the *Thurston* decision was handed down seven years ago, and indeed the varying and contradictory approaches taken within the Eighth Circuit, (see § B below), the time is ripe for this Court to clarify the law in this area. The Supreme Court should grant this Petition to reconcile the circuit conflict, and provide guidance to this unsettled area of federal age discrimination law.

B. The Eighth Circuit's Decision Sustaining the Liquidated Damage Award Conflicts With This Court's Decision in *Thurston v. Trans World Airlines, Inc.* and its Progeny.

As an additional and alternative basis for this Court to exercise jurisdiction in this matter, Defendant submits that in sustaining

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[6] Similarly, the Court of Appeals in the instant case identified the jury's finding of willfulness as a "close" issue. *See* Appendix A at p. A-7.

the award of liquidated damages below, based upon mere inferences rather than direct evidence of willfulness, the Eighth Circuit has rendered a decision contrary to this Court's decision in *Thurston v. Trans World Airlines, Inc.*, as well as in direct conflict with a long line of Eighth Circuit precedent interpreting *Thurston*. As amply shown in § A above, the Courts of Appeal have had difficulty applying the standard for willfulness announced by this Court in *Thurston* to disparate treatment cases. The difficulty arises in determining the type of evidence required to support a finding of willfulness, above and beyond the evidence required for the underlying ADEA liability. Defendant submits that, by expressly permitting the finding of willfulness to be sustained based upon mere inference, rather than direct evidence, the Court below has merely added to the confusion in this area. As such, Defendant submits that this issue calls for the exercise of this Court's supervision and guidance.

An examination of the Eighth Circuit's decisions interpreting the type of evidence required by *Thurston* to support willfulness demonstrates that the instant decision conflicts with prior interpretations of *Thurston* by the Eighth Circuit. For example, In the recent Eighth Circuit decision of *Hudson v. Normandy School District*, 953 F.2d 410 (8th Cir. 1992), the Court examined the plaintiff's burden in demonstrating that liquidated damages are appropriate in an ADEA case. Significantly, in reversing an award of liquidated damages, the court noted that when awarding compensatory damages, a jury may make *inferences* from evidence that it may *not* make when deciding whether to award liquidated damages. However, the Eighth Circuit in the instant case ignores its prior decision in *Hudson*, as well as its prior decisions in *Neufeld v. Searle Laboratory*, 884 F.2d 335 (8th Cir. 1989); *Morgan v. Arkansas Gazette*, 897 F.2d 945 (8th Cir. 1990); and *Rademacher v. State of Nebraska*, 906 F.2d 1309 (8th Cir. 1990). In this line of cases, the Eighth Circuit has consistently recognized that a finding of willfulness requires evidence beyond that required for the awarding of compensatory damages.

The court's language in *Hudson* above is based upon the Eighth Circuit's decision in *Neufeld v. Searle Laboratory, supra.* As noted in *Hudson*, *Neufeld* held that direct evidence of age-based animus—more than mere inference—is required before the trier of fact may properly find willfulness. The type of evidence found to be sufficient in *Neufeld* included a statement by the decisionmaker that he was trying to get rid of the older people in his department, and replace them with younger people. As stated by *Neufeld*, such is the type of evidence that is required to support a finding of willfulness.

Following the *Neufeld* decision, the Eighth Circuit decided *Morgan v. Arkansas Gazette, supra.* The *Morgan* court found liquidated damages inappropriate in that case, despite upholding an award of compensatory damages based upon a pattern of employees over 40 being replaced by younger ones, testimony that the decisionmaker treated younger employees better than older ones, and the jury's rejection of the employer's reason for the plaintiff's termination as pretextual. Citing *Neufeld*, the court reasoned that, while an award of compensatory damages may appropriately be based upon evidence of this nature, such evidence did not meet the standard adopted by the Supreme Court in *Thurston*. A finding of willfulness requires more than mere inference.

Consistent with *Neufeld* and *Morgan*, the Eighth Circuit again examined the issue of what type of evidence is required to support a finding of willfulness in *Rademacher v. State of Nebraska, supra.* In *Rademacher*, the Eighth Circuit affirmed a finding of willfulness based upon direct evidence of a reckless disregard for the provisions of the ADEA. Specifically, in *Rademacher*, the evidence indicated that the decisionmaker was warned by a subordinate that his proposed discharge of two protected-age group employees might be in violation of the ADEA. At trial, the decisionmaker testified that despite the warning that his actions may be in violation of the ADEA, he

"wasn't going to allow a law to prevent [him] from doing what is best for the state of Nebraska". Thus, the decisionmaker admitted he was aware of the ADEA's prohibition against age discrimination, but he was not going to let such a law "get in his way". The Court of Appeals noted that, taken at face value, direct evidence such as the decisionmaker's statement that he was terminating the employees *despite* the fact that the terminations may be ADEA violations supported the finding of willfulness.

By expressly permitting the finding of willfulness in the present case to be based upon *inference*, rather than direct evidence, the instant decision conflicts with the Eighth Circuit's prior line of cases which demonstrate the type of evidence necessary to support such a finding under the *Thurston* standard. No evidence was presented at trial of the type found necessary by *Neufeld*, *Morgan*, *Rademacher*, and *Hudson*. Rather, the Court's identification of mere inferences as supporting the willfulness finding blatantly disregards the Court's prior interpretations of *Thurston* in *Hudson*, *Neufeld*, *Morgan*, and *Rademacher* holding that a willfulness determination cannot be based upon mere inferences. In so doing, Defendant submits that the Eighth Circuit has not only departed from its own precedent, but has rendered a decision contrary to this Court's decision in *Thurston*; as such, a writ of certiorari is warranted.

II. The Court of Appeals Refused to Deduct the Increase in Assets of Plaintiff's New Business From Plaintiff's Monetary Award, Despite Plaintiff's Duty to Mitigate his Damages.

The present case also raises an important issue of federal law that has not been ruled upon by this Court relating to an alleged discriminatee's duty to mitigate his damages. Very early, this Court recognized that in fashioning backpay remedies, only actual losses should be made good, and deductions should be made not only for actual earnings by the worker during the

backpay period, but also for losses which he willfully incurred. *Phelps-Dodge Corp v. NLRB*, 313 U.S. 177 (1941). In the present case, following his termination, Plaintiff elected to open his own business. However, the trial court improperly failed to consider as an offset against Plaintiff's monetary award the increase in assets realized by Plaintiff's business, despite the fact that Plaintiff paid himself no salary based upon Plaintiff's alleged over 40 hours of work per week at his business. In effect, Plaintiff was permitted to artificially lower the proper deduction required to be made from his monetary award by failing to pay himself any salary whatsoever for his labors, instead choosing to retain said increases in capital in his business.

Without discussion of this issue, the Court of Appeals confirmed the decision of the trial court in this matter. While this Court has not ruled directly on the issue of a discrimination plaintiff's duty to mitigate his damages in the context of self-employment, the trial court cited a Third Circuit case, *Carden v. Westinghouse*, 850 F.2d 996 (3rd Cir. 1988), which sets out well reasoned factors to be considered in valuing Plaintiff's self-employment:

> "(1) Has plaintiff drawn a salary which has reduced, if not eliminated, the year end profit?
>
> (2) Have personal expenses, normally paid by a wage earner from a salary, been absorbed by the business (e.g., personal car expenses, insurance, vacation, and other personal expenses)?
>
> (3) Have dividends been paid?
>
> (4) Have profits been earned?
>
> (5) Have particular expenses been appropriately offset against revenues?
>
> (6) Have profits been reinvested in capital assets and have reserves been established?

(7) Has the plaintiff benefitted by an increased value in the business?"

However, despite enumerating these proper deductions, the trial court, as well as the Court of Appeals, nevertheless failed to take into account the increase in assets experienced by Plaintiff's business during the relevant period.

Because this issue has yet to be ruled upon by this Court, and this issue raises an important question of federal law concerning an alleged discriminatee's duty to mitigate his damages, the Petition for Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 91-3087 and 91-3088

Richard L. Godar,
Appellee/Cross-Appellant,

v.

Petrolite Corporation,
Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

[UNPUBLISHED]

Submitted: April 15, 1992
Filed: October 29, 1992

Before McMILLIAN and BOWMAN, Circuit Judges, and EISELE,* Senior District Judge.

PER CURIAM.

I.

The plaintiff, Mr. Richard L. Godar, filed his Complaint in the United States District Court for the Eastern District of Missouri on May 9, 1986, seeking damages and other relief under the Age Discrimination in Employment Act (ADEA). Mr. Godar had been employed by the defendant, Petrolite Corporation, in the position of Junior Chemist and later as Group Leader in the defendant's research department. He claimed in his Amended Complaint that he was discharged on August 12, 1985, "solely

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* The Honorable G. Thomas Eisele, Senior United States District Judge for the Eastern District of Arkansas, sitting by designation.

or substantially because of his age" in violation of Section 4(a)(1) of the ADEA. He also claimed that his discharge was "willful" within the meaning of the ADEA. He sought reinstatement, lost wages and other benefits, and reasonable attorney's fees. The defendant in its Answers generally denied the material allegations of the Amended Complaint and also asserted as its "First Defense" that the plaintiff had failed to mitigate his damages by not "actively and earnestly" searching for or accepting other employment.

It was stipulated that the plaintiff was employed by the defendant from November 8, 1954, until August 12, 1985, and that the plaintiff's rate of pay at the time of his discharge was $4,225.00 per month. It was also stipulated that 16 other named individuals in the defendant's Industrial Chemical Group were terminated in late July and August, 1985, and that the plaintiff and Mr. Tom Wells were terminated from the defendant's Research and Development Group on or about August 12, 1985.

After a three day trial the jury answered certain interrogatories in open court:

> THE COURT: All right, sir. I'll ask the clerk to announce the verdict.
>
> THE CLERK: Question number one: Do you find from a preponderance of the evidence that plaintiff's age was a determining factor in defendant's decision to discharge plaintiff?
>
> Answer: Yes.
>
> Number two: What amount of damages did the plaintiff sustain as a result of his discharge by defendant?
>
> One Hundred and ninety-three thousand dollars.

> Number three: Do you find from a preponderance of the evidence that defendant's decision to discharge plaintiff was willful as defined in the instruction?
>
> Answer: Yes.

Appendix at 25. Because of the jury's finding that the plaintiff's discharge was "willful", the lower court on July 1, 1988, entered judgment in favor of the plaintiff in double the amount of the actual damages, i.e., in the total amount of $386,000.00.

On October 10, 1989, the lower court ordered the defendant to reinstate the plaintiff to his former position. On May 31, 1991, the lower court awarded the plaintiff an additional sum of $51,098.37 for compensation lost between the date of the jury's verdict and the date of the plaintiff's reinstatement. It accepted the figure of $67,688.00 as the value of the plaintiff's annual compensation package. The period of time involved was 1.435 years. Therefore, the base figure came to $97,147.01. However, the court reduced this figure by the amount the plaintiff earned from his labor in managing his properties (the Natural Bridge Apartment Complex) and also by the amount the plaintiff realized from owning and operating a retail coin shop (Danrich). The court assessed the former at $9,775.64 and the latter at $36,300.00, or a total of $46,075.64. This amount was subtracted from the base figure or $97,174.01 to arrive at the additional compensation figure of $51,098.37.[1] The plaintiff was also awarded $29,973.50 in attorney's fees by Order entered September 8, 1988. Both parties agree that a mistake occurred in the calculation of the attorney's fee. The lower court awarded the plaintiff the fee requested but a reexamination revealed that the sum requested should have been $28,851.00, some $1,392.00 less than awarded.

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[1] There appears to be a slight error in the math. Our calculation results in a figure of $51,056.54 ($67,688 x 1.435 = $97,132.28 - $46,075.64 = $51,056.54).

The defendant appellant made oral motions for directed verdict at the close of the plaintiff's case and at the close of all the evidence. On July 18, 1988, the defendant filed a Motion for Judgment Notwithstanding the Verdict and a Motion for New Trial.[2]

---

[2]Since the issues on appeal refer directly to these two motion, we quote the grounds for each. The five stated bases for the former are:

> 1. Judgment Notwithstanding the Verdict is appropriate where, as here, the jury's verdict is not supported by substantial evidence.
>
> 2. Herein, the jury finding that age played a determining factor in Defendant's decision to discharge Plaintiff is without substantial evidentiary support.
>
> 3. Specifically, a reasonable jury could not find that Plaintiff, at the time of discharge, possessed the present ability to perform to Defendant's legitimate expectations as a bench chemist in Defendant's reorganized fuel additives group. Similarly, a reasonable jury could not find that the Defendant's decision was motivated by impermissible age bias. Simply put, Plaintiff's evidence, when viewed as a whole, is insufficient to support a finding that Defendant intentionally discriminate against Plaintiff due to his age.
>
> 4. Alternatively, even if Plaintiff's evidence supports a finding of intentional age discrimination, this fact alone does not support a finding that Defendant's actions were willful. Herein, Plaintiff has not introduced additional evidence which would warrant the imposition of liquidated damages. Said damages are punitive in nature and should be the exception and not the rule in ADEA actions.
>
> 5. Moreover, based upon Plaintiff's admissions, it is clear that he made no reasonable attempt to mitigate his damages, and he incurred a willful loss of earnings. Hence, Plaintiff's right to backpay is tolled.

Appendix at 31-32. The stated grounds for the Motion for New Trial were:

> 1. The Defendant is entitled to a new trial since the jury's verdict is against the weight of the evidence.
>
> 2. The Defendant is entitled to a new trial since the jury's verdict is excessive.
>
> 3. The Defendant is entitled to a new trial due to prejudicial judicial error.

Appendix at 33.

These two motions were denied by the lower court in its Order of September 8, 1988.

By its appeal the appellant, in its own words, seeks:

> 1. Reversal of the trial court's order denying Petrolite's motion for judgment NOW and, alternatively, a new trial, on the *issue of finding a willful violation* and the liquidated damage award.
>
> 2. Reversal of the trial court's order denying Petrolite's motion for a *directed verdict* that Plaintiff's evidence failed to establish a *prima facie* case and that Plaintiff, after December 1, 1985, had *failed to mitigate* his loss of earnings * * *
>
> 3. Reversal of the trial court's order denying Petrolite's motion for *judgment NOV* and, alternatively, a new trial on the issue of finding an ADEA violation.
>
> 4. Reversal of the trial court's order on *damages* denying Petrolite's motion for judgment NOV or, alternatively, direct a new trial or direct the trial court *to reduce the backpay award* * * *
>
> 5. Reversal of the trial court's order of May 31, 1991, to reduce the *frontpay award* * * *
>
> 6. In the event the Court rules favorably on this appeal, Petrolite requests a reduction in total or, alternatively, a *proportionate reduction of attorney's fees* * * *

Brief for Appellant at 48-50 (emphasis original).

II.

The defendant contends there was insufficient evidence to support the jury's verdict that the defendant violated the ADEA and that such violation was willful. Thus, the defendant argues,

the trial court erred in denying its Motion for Judgment Notwithstanding the Verdict and Motion for New Trial.

In *Johnson v. Minnesota Historical Society*, 931 F.2d 1239 (8th Cir. 1991), a reduction-in-force case, this Court discussed the elements necessary to establish a *prima facie* case of age discrimination.

> (1) [The plaintiff] was between 40 and 70 years old at the time of his termination;
>
> (2) [The plaintiff] was performing his job at a level that met the defendant's legitimate expectations;
>
> (3) Despite his performance in his job, [the plaintiff] was terminated;
>
> (4) [The plaintiff's] job in its various parts continued in existence;
>
> (5) [The plaintiff's] age was a determining factor in the defendant's actions.

Id. at 1242-43 (footnote omitted). To establish that a violation of the ADEA is willful, the plaintiff much show that the defendant intentionally violated the ADEA or acted in reckless disregard for the matter of whether its conduct was proscribed by the ADEA. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985).

Defendant argues that the plaintiff failed to establish a *primi* [sic] *facie* case in not proving that he was qualified for the position of chemist in Petrolite's reorganized fuel additives group. He also argues that no substantial evidence supports a finding that plaintiff's performance evaluation by the section heads was pretextual or that plaintiff's age was a determinative reason for his discharge.

Plaintiff views the factual context quite differently. He argues that the evidence shows that the events around August, 1985,

"were in the nature of a replacement of plaintiff by a 26 year old rather than an actual reduction in force in Research and Development; and that the section heads were not the actual decision makers in the discharge," Appellee's brief, p. 14. He argues that he was "uniquely qualified" for a position in the Fuel Additive's Group; that he had been demoted immediately prior to his discharge; and that he had continuously received merit raises for his performance as the leader of the Fuel Additive group. He further contends that:

> The evidence showed a very systematic scheme to generate a pretext and manipulate events prior to discharge, to prompt a resignation by demotion and suggestion of early retirement, and at the time of discharge discourage Plaintiff from seeking an attorney and encourage him to waive his ADEA rights. There was also direct evidence of age animus and that Appellant was legally sophisticated and familiar with the Act.

Appellee's brief, p. 14-15.

From a careful review of the evidence, taking into consideration the reasonable inferences that could be drawn from that evidence, it is this Court's opinion that a reasonable jury could, on the basis of that evidence, find these factual issues in favor of the plaintiff, and thereby conclude, as the jury did here, that "plaintiff's age was a determining factor in defendant's decision to discharge plaintiff." Jury's answer to Interrogatory Number One. And although the issue is closer here, the evidence would also permit a reasonable jury to find, as the jury did here, that "defendant's decision to discharge plaintiff was willful as defined in the instructions." Jury's answer to Interrogatory Number Two.

There is evidence from which the jury could find that Mr. Godar was the "founding father" of defendant's Fuel Additive Group; that he created the first fuel addition products for the

defendant back in 1957; that he was the first leader of the group; that he directed the group from the early 60's until July, 1985; that he received pay increases regularly; and that, although he was not qualified to do "hard core" chemistry, he was competent to perform the chemistry duties with which the Fuel Additive Group was usually concerned. Furthermore, Dr. Mange's ranking of the plaintiff emphasized plaintiff's problems with Marketing and with his supervision of his group. And the section heads did not refer to plaintiff's "rustiness" at "bench" work as the basis for their concurrence in the ranking decision mad [sic] by Dr. Mange.

Under the evidence it was open for the jury to question whether the section heads were the real decision makers in the process. The jury could have found that Dr. Tonkyn authorized Dr. Mange to rank those in Dr. Heinzelman's Section; Dr. Mange was the one who did that ranking; it was assumed the reductions would come from that section; Dr. Mange ranked the plaintiff alone in the lowest category of chemists and others in Dr. Heinzelman's Section; and that the section heads had little incentive and no substantial basis to make independent evaluations.

It was also open to the jury to question whether plaintiff's termination was truly a part of an active reduction in force in Research and Development. On the contrary, the jury could have found that a sophisticated process was being followed to, in effect, replace the plaintiff with a much younger person.

By the same token, it was open to the jury to find that the defendant's stated reasons for plaintiff's discharge, to-wit:

1. The alleged lack of cooperation with Marketing;

2. The alleged dissension within Mr. Godar's group; and

3. The alleged "forced ranking" to effect an alleged "reduction of force."

Appellee's brief, p. 26.
were not the true reasons, i.e. that they were pretests [sic]. The "lack of cooperation with Marketing" assumes that the dissension involved resulted from plaintiff's failure to perform some duty imposed on him. But the jury could have found otherwise. Furthermore, Mr. Binz's and Mr. Corneli's testimony tended to negate the existence of such problems.

The alleged dissension in plaintiff's group centered on the dissatisfaction of Mr. Cunningham. But Dr. Mange and Dr. Tonkyn knew that plaintiff had recommended Mr. Cunningham for promotion but did not so inform Mr. Cunningham, leaving it for the jury to infer that they did not wish to get rid of this problem but, rather, to use it as another pretest [sic] for plaintiff's discharge.

The "forced ranking" to effect the reduction in force could, under the proof, likewise, be viewed by the jury as simply a cover for a predetermined plan to get rid of the plaintiff.

Of course, the jury could have, as the basis of the evidence, agreed with the defendant — appellant's views completely, but it was open to it to find as it did.

It was also open to the jury to find "wilfulness" [sic] under the statute on the basis of the evidence discussed above coupled with other evidence showing the awareness of the defendant of the provisions of the ADEA, the manner in which the discharge was effected, the sequence of events, plus the direct evidence of age animus, to wit, Dr. Mange's statement that the plaintiff was too old to get into Marketing and, in the unusual context here, the statement of Dr. Tonkyn concerning "early retirement," keeping in mind that Dr. Tonkyn determined who would rank the Heinzelman Section, that he was in charge of the Section and conducted the meeting of section heads. Appellee in his brief argues the following scenario:

> A clear pattern is presented by the evidence. Petrolite begins generating problems for Mr. Godar in late 1984. A

> replacement is contemplated. Petrolite wants the replacement hired and trained before Mr. Godar is discharged. When Mr. Godar selects a older individual, his decision is promptly vetoed. Another individual is hired, age 26. After Mr. Godar has trained and acclimated his replacement, he is demoted. When he asks for reconsideration, Petrolite suggests he take early retirement. When he declines, he is discharged.

Appellee's brief, p. 25-26

The evidence in this case would permit a reasonable jury to draw such inferences.

This Court recently explained in detail the legal standards applicable to j.n.o.v. and new trial motions. *White v. Pence*, 961 F.2d 776 (8th Cir. 1992). With respect to a motion for j.n.o.v., the *White* Court stated:

> First, it is evident that the standards for considering a motion for j.n.o.v. differ thoroughly from those governing consideration of a motion for new trial. In a motion for j.n.o.v., the question is a legal one, whether there is sufficient evidence to support a jury verdict. This court must analyze the evidence in the light most favorable to the prevailing party and must not engage in a weighing or evaluation of the evidence or consider questions of credibility. We have also stated that to sustain a motion for j.n.o.v., all the evidence must point one way and be susceptible of no reasonable inference sustaining the position of the nonmoving party. These principles have no application to the consideration of a motion for new trial on the ground that the verdict is against the weight of the evidence.

Id. at 779 (citations and footnotes omitted).

As to a motion for a new trial, the *White* Court articulated this standard:

> With respect to motions for new trial on the question of whether the verdict is against the weight of the evidence, we have stated: In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence — it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.
>
> * * *
>
> [W]e made plain that the ultimate test [in determining whether to grant a new trial] was whether there had been a miscarriage of justice.
>
> * * *
>
> The district court's discretion is not boundless, however. We [have previously stated] that the district court is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. We similarly observed that the trial judge may not usurp the functions of a jury . . . [which] weights the evidence and credibility of witnesses.

Id. at 780-81 (citations and internal quotations omitted).

The Court has reviewed the record as a whole and concludes that the lower court properly denied Petrolite's motion for judgment notwithstanding the verdict. When viewed in the light most favorable to Mr. Godar, the evidence is sufficient to support the jury's verdict in his favor.

With respect to Petrolite's motion for new trial, in *White* we stated "We have recognized the Supreme Court's pronouncement that the authority to grant a new trial is confided almost entirely to the exercise of discretion on the part of the trial court, and that great deference is to be accorded the trial judge's decision in such rulings." 961 F.2d at 781 (citations and internal

quotations omitted). This Court perceives neither a miscarriage of justice nor an abuse of discretion on the part of the lower court in denying Petrolite's motion for new trial.

III.

Petrolite next appeals the lower court's denial of its motions for a directed verdict and for j.n.o.v. on the amount of backpay damages awarded to Mr. Godar. Petrolite argues that Mr. Godar failed to mitigate damages in that he did not make a reasonable effort to obtain employment substantially equivalent to his position with Petrolite or his training and background. *See Coleman v. City of Omaha,* 714 F.2d 804 (8th Cir. 1983).

Mr. Godar presented evidence that positions substantially equivalent to his employment with Petrolite were obtained through the industry "pipeline", that is, through inside contacts and contacts with recruiters and headhunters. He also presented evidence concerning his efforts to obtain comparable employment through the "pipeline" and other means, the availability of comparable positions and that his efforts to establish his own business were reasonable under the circumstances.

After a review of the record, the Court concludes that the lower court properly denied Petrolite's motions for directed verdict and j.n.o.v. on the issue of mitigation of damages. When analyzed in the light most favorable to Mr. Godar, the evidence is sufficient to support the jury's verdict. This Court cannot say that all the evidence points Petrolite's way and is susceptible of no reasonable inference adequately sustaining the position of Mr. Godar.

IV.

By Order dated May 31, 1991, the lower court awarded Mr. Godar $51,098.37 ($51.056.54 by this Court's calculation) in frontpay, representing his damages from the time of the jury

verdict (July 1, 1988) until Mr. Godar's reinstatement with Petrolite (November 1, 1989).

Both parties appeal the amount of the frontpay award. Petrolite contends that during the relevant period, Mr. Godar failed to seek comparable employment and is therefore not entitled to any frontpay. Petrolite also argues that even if Mr. Godar is entitled to frontpay, the lower court failed to adequately reduce the frontpay award by the amounts Mr. Godar earned from his property management business and his retail coin shop.

Mr. Godar, on the other hand, argues that the lower court erred by attributing to him, and thus reducing the frontpay award thereby, the entire $36,300 profit earned by the retail coin shop. Mr. Godar contends that one-half of those profits should be attributed to Mrs. Godar and added back to the frontpay award. Mr. Godar further argues that the lower court erred in its calculation of the amount of frontpay award reduction resulting from the management of the apartment complex.

The Court has reviewed the evidence, the parties' briefs, and the cases cited therein, with respect to the frontpay award issues raised in this appeal. With the exception of the minor mathematical error discussed *supra*, the Court finds no error in the lower court's calculation of the frontpay award.

V.

The final issue before the Court concerns the award of attorney's fees. The lower court awarded Mr. Godar attorney's fees in the amount of $29,973.50. Petrolite contends that, as the result of a mathematical error on Mr. Godar's part, the correct attorney's fee should be $28,581.50. Mr. Godar does not contest this issue. The Court concludes that the proper amount of attorney's fees is $28,581.50.

VI.

In conclusion, the lower court's order denying Petrolite's motions for j.n.o.v. and new trial is affirmed. The Order of May 31, 1991, awarding Mr. Godar frontpay is affirmed as modified to reflect a frontpay award in the amount of $51,056.54. The Order of September 8, 1988, awarding Mr. Godar attorney's fees is affirmed as modified to reflect an attorney's fee award in the amount of $28,581.50.

AFFIRMED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 86-947 C (5)

RICHARD L. GODAR,
Plaintiff,

vs.

PETROLITE CORPORATION,
Defendant.

ORDER

IT IS HEREBY ORDERED that plaintiff is awarded costs pursuant to 28 U.S.C. § 1920 in the amount of Six Hundred Forty-Four and 55/100 Dollars ($644.55). This amount represents $464.55 for the depositions of Richard G. Tonkyn and Franklin Mange and $180.00 for fees of six non-party witnesses called by plaintiff.

IT IS FURTHER ORDERED that plaintiff is awarded attorney's fees in the amount of Twenty-Nine Thousand Nine Hundred Seventy-Three and 50/100 Dollars ($29,973.50).

IT IS FURTHER ORDERED that defendant shall respond in writing within ten (10) days to plaintiff's motion for additional benefits to be awarded to plaintiff.

IT IS FURTHER ORDERED that defendant's motion for judgment notwithstanding the verdict is DENIED.

IT IS FINALLY ORDERED that defendant's motion for new trial is DENIED.

Dated this 8th day of September, 1988.

/s/ Stephen M. Limbaugh
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 86-947-C-5

RICHARD L. GODAR,
Plaintiff,

vs.

PETROLITE CORPORATION,
Defendant.

ORDER

[Filed: May 31, 1991]

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that plaintiff is awarded additional monetary compensation of $51,098.37 (fifty one thousand ninety eight dollars and 37/100) plus interest accrued on this sum since November 29, 1989 at a rate of 6.07%.

Dated this 31st day of May, 1991.

/s/ Stephen M. Limbaugh
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 86-947-C-5

RICHARD L. GODAR,
Plaintiff,

vs.

PETROLITE CORPORATION,
Defendant.

MEMORANDUM

[Filed: May 31, 1991]

Plaintiff seeks additional monetary compensation of $97,174.01. Plaintiff arrived at this figure by multiplying the value of his annual compensation package (67,688.00) by the number of years between the jury verdict and his reinstatement (1.435). The Court, however, reduces plaintiff's request by the amount which plaintiff earned from his labor for the relevant period. From July, 1988 to November, 1989 plaintiff worked eighty hours per week managing his properties (Natural Bridge Apartment Complex), and owning and operating a retail coin shop (Danrich).

Natural Bridge Apartment Complex

Prior to his termination plaintiff hired professional apartment managers to manage the Natural Bridge Apartment Complex. After the termination plaintiff assumed the responsibility of managing the apartment complex. On April 10, 1991 the Court ordered the parties to submit documentation concerning the value of plaintiff's services as an apartment manager.

Professional apartment managers charged plaintiff a percentage of gross receipts for their services. According to defendant's

accountants, the gross rents of the apartment complex for the period in question totaled $139,652.00. Prior to his termination plaintiff paid to professional managers between 5% and 6.5% of gross rents. Plaintiff estimated, however, that the percentage would have risen to approximately 7% during the period in question. The amount that plaintiff would have paid to a professional apartment manager is the value of plaintiff's services for the performance of the same duties. Therefore, the Court will reduce plaintiff's award by $9,775.64 ($139,652.0 * .07).

Danrich

After his termination plaintiff owned and operated a retail coin shop. In *Carden v. Westinghouse,* 850 F.2d 996 (3d Cir. 1988), the court set forth relevant factors to consider in valuing plaintiff's self employment:

> (1) Has plaintiff drawn a salary which has reduced, if not eliminated, the year end profit?
>
> (2) Have personal expenses, normally paid by a wage earner from a salary, been absorbed by the business (e.g., personal car expenses, insurance, vacation, and other personal expenses)?
>
> (3) Have dividends been paid?
>
> (4) Have profits been earned?
>
> (5) Have particular expenses been appropriately offset against revenues?
>
> (6) Have profits been reinvested in capital assets and have reserves been established?
>
> (7) Has the plaintiff benefitted [sic] by an increased value in the business?

The Court has reviewed the conclusions of defendant's accountants regarding the Danrich coin shop and finds them to be reliable. Defendant estimated the profit from Danrich to be $35,300.00 for the relevant period. Therefore, the Court will reduce plaintiff's award of additional monetary compensation by $36,300.00.

For the foregoing reasons, the Court awards plaintiff additional monetary compensation in the amount of $51,098.37 ($97,174.01 - $9,995.64 - $36,300.00). Plaintiff shall also receive interest on his award, accrued at the rate of 6.07%, from November 29, 1989, the date on which plaintiff was reinstated.

Dated this 31st day of May, 1991.

/s/ Stephen M. Limbaugh
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3087EMSL
No. 91-3088EMSL

Richard L. Godar,
Appellee/Cross-Appellant,

vs.

Petrolite Corporation,
Appellant/Cross-Appellee.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

December 8, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

No. 92-1461

Supreme Court, U.S.
FILED
APR 6 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

PETROLITE CORPORATION,

Petitioner,

vs.

RICHARD L. GODAR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should impose a more onerous standard of willfulness on an ADEA plaintiff because the defendant has treated the plaintiff discriminatorily than It imposes when the defendant has only adopted a policy or rule which has a disparate impact?

2. Whether a finding of willfulness was reversible error when:

   A. the jury instructions defined willful as defined in *Trans World Airlines v. Thurston,* 469 U.S. 111 (1985), and;

   B. there was direct evidence of age animus in the statements of two (2) corporate vice presidents who played central roles in the discharge, and;

   C. the defendant actively caused or knowingly cultivated the very problems used as pretext, and;

   D. a short sequence of events culminated in an alleged reduction in force which did not decrease the number of personnel in plaintiff's group but did replace plaintiff with a young chemist, and;

   E. the defendant gave a purely nominal role in the discharge to a group of individuals whom it called the decision makers, and;

   F. the defendant attempted to humiliate plaintiff into retiring just weeks prior to discharge, and;

   G. the defendant was legally sophisticated and knew the provisions of the ADEA?

3. Whether an ADEA plaintiff who is in a job market where only two (2) comparable positions have become available in a three (3) year period, who has made efforts reasonably calculated to obtain these positions and has continued to employ a headhunter and interview for positions while also acquiring and running a small business; should be required to pay himself a salary from a business which is losing money, or have the inventory which he has purchased by acquiring debt and selling his previously owned assets, treated as earnings by ignoring the debit and liability side of his operations?

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B. The present case presents no conflict with *Thurston* and petitioner's argument is premised on the misstatement that the present case involved no direct evidence of willfulness.	10
II. No factual or legal issue of significance is presented by the alleged increase in inventory or failure to draw a salary in that petitioner has simply not disclosed the lack of profit in the business nor the debit and liability side of the ledger.	12
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APPENDIX

Appendix A — Joint Stipulation of the United States District Court, Eastern District of Missouri, Eastern Division 1a

No. 92-1461

In The

Supreme Court of The United States

October Term, 1992

PETROLITE CORPORATION,

Petitioner,

vs.

RICHARD L. GODAR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATUTE INVOLVED

(SUPPLEMENTAL)

29 U.S.C. § 626(c)(1)(2):

> (c) Civil actions; persons aggrieved; jurisdiction judicial relief; termination of individual action upon commencement of action by Commission; jury trial

> (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter; *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the rights of such employee under this chapter.
>
> (2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

STATEMENT OF THE CASE

Petitioner's statement of the case requires supplementation as it omits significant material and assumes as given many of it's own contentions which were clearly the central disputed issues in litigation.

The case arose from the termination of respondent Richard Godar in August of 1985. Respondent was terminated from his position as a chemist in the Fuel Additives Group, in the Research and Development Division (referred to as a "group" in the stipulations), as the culmination of an unusual sequence of events. The sequence is only briefly summarized by the Eighth Circuit panel (A-9, 10).

The company has misstated the evidence when it indicated that there was no direct evidence of willfulness or discrimination (Pet. at 5, 13, 15). To the contrary, the Eighth Circuit noted in it's opinion:

> It was open to the jury to find "wilfulness" [sic] under the statute on the basis of the evidence discussed above coupled with other evidence showing the awareness of the defendant of the provisions of the ADEA, the manner in which the discharge was effected, the sequence of events, *plus the direct evidence of age animus, to wit, Dr. Manges statement that the plaintiff was too old to get into Marketing and, in the unusual context here, the statement of Dr. Tonkyn concerning "early retirement,"* keeping in mind that Dr. Tonkyn determined who would rank the Heinzelman Section, that he was in charge of the Section and conducted the meeting of the section heads.

(A-9, emphasis added).

Without any supporting discussion, petitioner inexplicably asserts that there was no direct evidence of willfulness. This seems incomprehensible in light of the explicit language of the Eighth Circuit. Respondent can only anticipate that petitioner will in a reply brief assert that the above referenced Drs. Mange and Tonkyn were not the decision makers. The Eighth Circuit has already heard and discussed this contention (A-8, 9). Even viewed in the light most favorable to the company, Dr. Mange had by far a greater impact on the selection of respondent than any of the other members of the group to which the company seeks to attribute the decision. The discharge followed inevitably from the rankings

which Dr. Mange performed. The fact that Dr. Mange did the ranking of the respondent and participated as the acting section head of the targeted section was never in dispute.

The company has described this as a "reduction in force" case without further discussion when the issue clearly was a primary point of contention at trial and on appeal. Counsel for the company has inaccurately suggested that a stipulation was made that there was a reduction in force and the respondent's discharge was part of said alleged reduction (Pet. at 4). As the Eighth Circuit noted in it's opinion there was a stipulation that, in the months of July and August, certain named individuals were terminated from a division (other than the one in which respondent was employed) (A-2). There was no stipulation that this event in a different division was a reduction in force, that the terminations were due to a reduction in force or even that the named individuals were not being replaced or that the division ultimately ended up with fewer employees. It is clear from other discussions in the Eighth Circuit's opinion that it did not consider there to have been any stipulation as asserted by the company (A-6-10). The specific stipulation is reproduced as respondent's appendix (1a).

It is highly inaccurate for petitioner to refer to this case as a reduction in force case as though this assertion was uncontroverted. The uncontroverted evidence showed that the total number of individuals in the Fuel Additives Group, where respondent was employed, was four (4) at the beginning of the sequence of events in late April, 1985 and was four (4) at end of the sequence on August 12, 1985. In addition Dr. Tonkyn, the head of the Division, issued a memo authorizing yet another new hire the day after respondent's discharge. The case was consistently argued as one of replacement disguised as reduction in force throughout trial.

Petitioner raised on appeal the question of whether or not the

evidence supported a finding of willfulness (A-5). A three (3) judge panel unanimously believed the evidence did and affirmed in an unpublished opinion (A-1, 14). The evidence in the case was very rich in detail and much attention had been focused on demonstrating that the proffered reasons given by petitioner company had been insincere and manipulated (A-7-10). The Eighth Circuit's summary is, in fact, relatively skeletal:

Beginning ten (10) months before discharge petitioner began actively generating episodes where it initiated some problem and then wrote Mr. Godar up for the problem. Personal hostility within Mr. Godar's group was cultivated by Dr. Mange and Dr. Tonkyn when both vice presidents inexplicably failed to correct the impression of a Mr. Cunningham, who inaccurately believed that Mr. Godar had been opposing his promotion. Mr. Godar had been unsuccessfully urging a promotion for Mr. Cunningham to these two (2) corporate officers. Mr. Cunningham had met with both officers and discussed the problem. Instead of correcting the misunderstanding, Dr.'s Tonkyn and Mange remained silent and used Mr. Cunningham's unhappiness as a stated reason for respondent's demotion and discharge.

In late winter/early spring of 1985 the company authorized respondent, who was then the leader of the Fuel Additives Group, to hire a chemist due to the acknowledged manpower shortage in the group. Respondent selected a man in his mid-forties. Within a few weeks he was instructed by Dr. Mange to discharge this middle-aged man although there was no job performance problem. With the assistance of Drs. Mange and Tonkyn a young chemist age twenty-six (26) was then hired into Mr. Godar's group instead. Approximately ninety (90) days later Mr. Godar was demoted and encouraged to retire.

Within days of Mr. Godar's refusal to retire, Dr. Tonkyn called a meeting of the section heads allegedly to effect a forced ranking

to effect an alleged reduction in force of two (2) from Research and Development. Mr. Godar's section was specifically targeted for both discharges according to the participants' own testimony.

Mr. Godar was the only person ranked according to factors which were admittedly no longer relevant to his then position. Mr. Godar was not ranked by his own section head, rather Dr. Tonkyn had assigned Dr. Mange the task. Dr. Mange ranked Mr. Godar and the others in the section in such a way that Mr. Godar could not possibly avoid being one (1) of two (2) discharges earmarked to come from the section. Mr. Godar's name was the first placed on the blackboard at the section head's meeting. The next day after the alleged reduction Dr. Tonkyn authorized a new hire for the division.

The case was consistently argued to the jury as involving premeditation and goal oriented manipulation rather than reckless disregard.

The company also has provided a very incomplete picture in it's discussion of the mitigation issues. The Eighth Circuit has only briefly discussed these issues in Section III of it's opinion (A-12).

The company produced no evidence of any comparable position which its own out placement service had located. Only two (2) comparable positions were identified in a three (3) year period although petitioner did try to assert that a number of positions, at a much lower pay and generally in fields unrelated to respondent's expertise, were comparable. There was only one potential employer in the geographical area and respondent had certainly made his availability known to that employer. When this one employer did have a comparable position open the employer actively recruited through a headhunter an individual who had made absolutely no efforts to obtain the position. Methods such as headhunters were the customary means by which comparable

positions were actually filled and respondent engaged in such methods including employment of his own headhunter. Formal applications were generally submitted after being hired, not before.

The company's discussion in regard to the respondent's coin shop operation inappropriately omits half of the financial picture. After months of searching for a comparable position, respondent purchased an ongoing business, *i.e.* a coin shop, but the purchase did not include any significant inventory.

Respondent mortgaged his home to provide funds to run the business and to purchase inventory. Respondent borrowed substantial sums commercially and from his sister for the same purposes. In addition he eventually sold his home and some recreational real estate for the same purposes. The increase in inventory went hand in hand with a corresponding increase in liability and loss of other assets.

Petitioner also describes this situation as one where respondent "elected" not to pay himself a salary. The evidence did not show any profits in the business during the backpay period. The full amount of profits (per petitioner's accountants) during the interim or front pay period were duly deducted from that award.

REASONS FOR DENYING THE WRIT

Under any of the standards proposed for judicial review of jury finding of willfulness, the evidence in the present case would be sufficient. Petitioner's conduct involved much that was odious, was highly systematized, and involved much manipulation to insure that a young chemist would replace respondent. The proffered reasons for discharge were such that they could not logically be seen as both pretext and a sincere factor in the motivation for discharge.

The opinion below does not conflict with *Thurston*. *Thurston* did not add any additional elements to the ADEA, but reviewed the willfullness finding more carefully than a liability finding. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Nothing in *Thurston* indicated an additional tier should be added to the statute to favor a defendant precisely because the evidence shows that the defendant had treated the plaintiff adversely due to plaintiff's age. On the contrary, *Thurston's* reasoning would logically require that, to the extent we have selected a subcategory of violations based on criteria indicative of willfulness, the subcategory would necessarily have a proportionally higher rate of liquidated damages awards. If that were not the case we would have to question if the two-tiered system were working correctly. The opinion below follows *Thurston* in language and reasoning.

Petitioner's suggestion that the Eighth Circuit's opinion is in conflict with the progeny of *Thurston* is premised on the inaccurate assertion that there was no direct evidence to support the willfulness finding.

Petitioner's suggestion that a significant issue is presented in the mitigation issues is also premised on an inaccuracy. Petitioner can only frame a sensible argument on this issue by ignoring the rarity of available comparable jobs, the limited profits in the respondent's small shop, and the debit and liability side of his operations.

I.

A. THE RESULT REACHED IN THE PRESENT CASE WOULD NOT LIKELY BE CHANGED BY A RESOLUTION OF THE CONFLICTS CITED BY PETITIONER.

The most significant conflict in the opinions cited by petitioner is between those which review on a case by case basis

with a higher degree of scrutiny and those which adopt a specific test or formula as an additional element to the statute.

The former cases may employ various verbal formulae but use such as tools of judicial analysis rather than added elements. *Cf. Lindsay v. American Case Iron Pipe Co.*, 810 F.2d 1094, 1100 (11th Cir. 1987); *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989), *cert. denied*, 493 U.S. 842 (1989); *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) also falls in this category. *Thurston* did not add any additional requirement to the statute, but engaged in a careful scrutiny of the evidence to determine if it supported liquidated damages. *Id.* at 129. *Dreyer v. ARCO Chemical Co.*, substantially relied on by petitioner, is also such a case and indicated that no litany of circumstances could be recited which would inclusively describe all the instances when it's "outrageous conduct" principle would be present. *Dreyer v. ARCO Chemical Co.*, 801 F.2d 651, 658 (3rd Cir. 1986), *cert. denied*, 480 U.S. 906 (1987). Dreyer clearly used the word "outrageous" as a term of art and indicated review of a willfulness finding should be based on an "ad hoc" enquiry into the circumstances of each case. *Id.* Systematic purging of older employees would, for example, be a form of outrageous conduct. *Id.*

Those opinions which formally adopt a precise formula or test add elements or procedural requirements which would be peculiar to disparate treatment cases. Such opinions will typically require additional jury instructions or instructions differing from *Thurston*. *Cf. Wheeler v. McKinley Enterprises*, 937 F.2d 1158, 1166 (6th Cir. 1991); *Schrand v. Pacific Elec. Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988). Alternatively a requirement that respondent produce direct evidence of the opponent's state of mind has been advanced. *Hudson v. Normandy School District*, 953 F.2d

410 (8th Cir. 1992). All of the latter class of opinions impose some additional element or requirement on those ADEA respondents who have been found to be victims of specifically directed discrimination because this subcategory of violations inherently suggests willful conduct and often results in such a finding.

Petitioner company raised on appeal the question of whether the evidence supported a finding of willfulness. Respondent suggests that the evidence meets any and all of the standards proposed by petitioner. The present case involved not only direct evidence of age animus, but much of petitioner's conduct was odious, systematic, and contrived to whitewash an age based discharge. The manipulative nature of petitioner's proffered reasons for discharge are such that, if rejected by the jury, they could not reasonably be also seen as sincere factors in the discharge. The nature of the pretext is such that it shows willfulness and not a lack thereof.

Mr. Cunningham's situation offers an excellent example. There was an abject failure by Drs. Mange and Tonkyn to treat this problem as one of sincere concern to themselves or the company. Subsequently this problem was offered as a basis for the discharge although it was admitted to no longer be relevant to respondent's job at the time of discharge. It would be logically impossible to see this alleged "dissension" within Mr. Godar's group as both pretext and also as, to any extent, a sincere factor in the motivation for discharge given the particular facts of this case.

B. THE PRESENT CASE PRESENTS NO CONFLICT WITH *THURSTON* AND PETITIONER'S ARGUMENT IS PREMISED ON THE MISSTATEMENT THAT THE PRESENT CASE INVOLVED NO DIRECT EVIDENCE OF WILLFULNESS.

Respondent finds it difficult to see how the opinion below can be said to conflict with *Thurston* when the instruction used was the

one approved in *Thurston*. *Thurston, supra.* at 126.

Thurston has been concerned with the application of this definition in a case involving disparate impact and the use of a "in the picture" standard. *Id.* at 127-128. *Thurston* clearly envisioned a two-tiered system in regard the overall category of all ADEA cases. However, we are now considering only a subcategory of violations which have been selected specifically for the presence of factors indicating that the violation was willful. One would expect a large percentage of the violations so selected to involve conduct which was willful in fact. There is nothing in *Thurston* to indicate that varying two-tiered schemes be applied to different subcategories to effect some uniform rate of success in each category. *Thurston's* reasoning would logically require that, to the extent we have selected a subcategory of violations based on criteria indicative of willfulness, the subcategory would necessarily have a proportionally higher rate of liquidated damages awards. If that were *not* the case we would have to question if the two-tiered system were working correctly.

To read *Thurston* as does petitioner would effectively reward intentional violations precisely because the evidence adduced at trial would necessarily show, to some degree, that the violation was willful. The presence of factors demonstrating willfulness would by definition trigger a higher standard or definition of willfulness. This would be inconsistent with *Thurston's* view that Congress intended to deter and not encourage willful violations. *Id.* at 125.

Petitioner also argues that the opinion below is in conflict with *Thurston's* progeny because there was not direct evidence of willfulness. This is clearly incorrect as the Eighth Circuit specifically noted the presence of direct evidence of age animus (A-9).

Although not initially presented by petitioner, respondent must anticipate that petitioner will respond with an argument that the direct evidence referred to by the Eighth Circuit were not statements made by the decision makers. Even viewed in the light most favorable to petitioner's contention, Dr. Mange was the most influential of the alleged participants. It was established from the company's own witnesses that Dr. Mange ranked the individuals from the section in which Mr. Godar was employed, that this same section was the one targeted for the only discharges which were to occur, and that the discharges followed Dr. Mange's ranking. None of section heads were allowed as much effective input and the circumstances created by Dr. Tonkyn clearly dissuaded them from any disagreement.

In the light most favorable to respondent the section heads played no real part in the decision but were only a cosmetic applied to conceal the fact that the decision had already been made.

II.

NO FACTUAL OR LEGAL ISSUE OF SIGNIFICANCE IS PRESENTED BY THE ALLEGED INCREASE IN INVENTORY OR FAILURE TO DRAW A SALARY IN THAT PETITIONER HAS SIMPLY NOT DISCLOSED THE LACK OF PROFIT IN THE BUSINESS NOR THE DEBIT AND LIABILITY SIDE OF THE LEDGER.

Petitioner argues that the court has failed to consider an increase in inventory at the coin shop which Mr. Godar acquired and operated during the back pay period. Petitioner suggests without explicitly stating that the increase in inventory was hidden profit of some sort. Petitioner also suggests that Mr. Godar should have a salary attributed to him in relation to the business. Petitioner can only frame a viable argument by failing to disclose salient facts pertaining to the issue.

Respondent mortgaged and later sold his home, and sold other property to provide operating expenses and acquire inventory for his coin shop. He also borrowed heavily from other sources.

The coin shop did not operate at a profit and there was no basis for believing that a salary for the respondent would have represented anything other than additional borrowed funds.

Petitioner's argument that there was an increase in inventory ignored an even greater increase in debt.

The Court's approach was consistent with *Carden v. Westinghouse* which indicates that we must look at the reality of what gain has or has not been realized by the respondent. *Carden v. Westinghouse*, 850 F.2d 996, 1006 (3rd Cir. 1988).

Petitioner complains that Eighth Circuit did not even discuss this issue. Respondent respectfully suggests that the contention is so strained as to merit no discussion. Petitioner considered the inventory's value without considering the debt incurred in it's acquisition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — JOINT STIPULATION OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 86-0947-C-5

RICHARD L. GODAR,

Plaintiff,

v.

PETROLITE CORPORATION,

Defendant.

JOINT STIPULATION

1. Plaintiff was employed by Defendant from November 8, 1954 until August 12, 1985.

2. Plaintiff and Tom Wells were terminated from Defendant's Research and Development Group on or about August 12, 1985.

3. The following individuals were terminated by Defendant from its Industrial Chemical Group: S.B. Young, J.M. Tobin, E.E. Quin, D. Torres, A.J. Wieber, G.A. Roeder, E.J. Hautala, M.V. Allen, C.W. St. Amant, D.R. Grimes, R.A. Hayes, W.L. Kearns, R.J. Johnson, E.D. Childers, S.P. Seay, and D.P. Binz. The aforementioned individuals were terminated late July and August, 1985.

Appendix A

4. Plaintiff's rate of pay at the time of his demotion and discharge was $4,225.00 per month.

5. Plaintiff's date of birth is May 26, 1930.

Respectfully submitted,

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